[ORIGINAL CIVIL JURISDICTION]

PRICHARD, J.

June 12, 1934.

RANCHORDAS PURSHOTAM.....Plaintiffs

v.

ENA MOHAMED ISMAIL.....Defendant

[SINGAPORE SUIT No. 366 of 1933]

Bills of Exchange—Promissory note payable by instalments—Indorsement after note due—Agreement between maker and payee before indorsement—Whether indorsee "a holder in due course."

Where a promissory note payable by instalments was indorsed for value after some instalments had fallen due the indorsee is entitled to recover against the maker the whole of the balance payable on the note according to its tenor notwithstanding that there had been payment of certain sums under an antecedent agreement between maker and payee for the settlement of the whole amount of the note for a lesser sum.

Action tried before Prichard, J.

The plaintiffs sued the Defendant for the recovery of $3,000 being the amount due on a promissory note dated the 20th November, 1932, and made by defendant in favour of K. Mohamed Sedik & Co. or order payable by monthly instalments of $50 each. The note entitled the payee or any subsequent holder to claim the whole balance remaining unpaid upon default in the payment of any one instalment. The plaintiffs claimed to be the indorsees for the value of the note. The defendant pleaded that before the note was indorsed in favour of plaintiffs an agreement had been reached between the managing partner of K. Mohamed Sedik & Co. and himself whereby the claim upon the note was to be settled for $500 and that he had already paid $393.85 in part payment of this sum. It was further contended that the suit was premature and that the plaintiffs were not holders in due course.

Mallal for the Plaintiffs. Assuming that an agreement had been made between the defendant and the payee of the note and that a sum of $393.85 was paid to the payee before note was indorsed to the plaintiffs, the question is whether the payment of that amount can be considered as the payment of the instalments due when the note was indorsed and of some further instalments which became due after the indorsement.

The note was indorsed on the 12th of April, 1933. As on the 20th of March, 1933, the defendant was liable to pay 4 instalments, at the date of indorsement, the 4 instalments were due.

The maker of a promissory note by making it engages that he will pay it according to its tenor (Bills of Exchange Act, 1882, S. 88). The defendant does not contend that he paid the note according to its tenor. His contention is that under a separate and independent agreement touching this note the payee had become liable to him for $393.85 and that such an amount should be applied in payment of the instalments.

Such contention cannot be upheld at least so far as the plaintiff is concerned. It would not be upheld even against the payee if he himself had elected to sue on the note.

The defendant is not entitled to set off as against the plaintiffs the sum of $393.85. *Chalmers*, p. 40; illustrations 5 and 6 to section 36 of Bills of Exchange Act; *Oalds* v. *Harrison*, (1854) 10 Exch. 572; *Ex parte Swan*, (1868) L.R. 6 Eq. 344; *Burrough* v. *Moss*, 10 B. & C. 558.

Goho (*Bannerjea* with him). Plaintiff is not a holder in due course. The note was overdue. The payment of the amount was payment of instalments, *Mooto Raman Chetty* v. *Ek Kah Pay and another*, (1905—1909) Vols. 9 and 10 S.S.L.R. p. 115.

Cur. Ad. Vult.

PRICHARD, J.—This is a claim by the indorsee of a promissory note for $3,000 dated 20th November, 1932, payable by $50 instalments in 60 months. In default of payment of any instalment when it should become due the whole of the balance was to become payable. The Plaintiff alleges that default was made in the payment of the 1st and subsequent instalments.

The Defence is to the effect that by a subsequent verbal agreement the then payee of the note K. Mohamed Sedik & Co. (by their managing partner Anna Packir Mohamed) agreed to settle the debt by a payment of $500 within 5 months' time of the date of the agreement.

The Defendant further says that he had paid $393.85 to K. Mohamed Sedik & Co. before the note was indorsed to the Plaintiff on the 12th April, 1933. He contends that the suit is premature and that the Plaintiff is not a holder in due course.

I did not believe the evidence of the Defendant on whom the onus lay. In paragraph 2 of the Defence the date of the alleged verbal agreement is given as "On or about the 22nd of December, 1932." Although the defence was filed on the 7th June, 1933, it was only on the 8th May, 1934, that Defendant's solicitors when pressed by the Plaintiff's solicitors for an exact date, specified the 10th December, 1932. We find from Defendant's books that he made a payment of $40 to account on the 11th December, 1932, and therefore he had to adapt his date to suit that payment. No explanation was forthcoming for this change of date except that it was a mistake which he discovered last year, therefore in 1933.

Defendant called a witness who differed from him on the point as to whether any arrangement had been made for the return of the promissory note.

Again although he alleges he paid $393.85 he stated he had no receipts for some of the sums which made up that figure. But he had acknowledgments and produced registered post receipts for others. He admitted that the $3,000 mentioned in the promissory note was a sum paid in compromise of a debt for $8,600 which he owed K. Mohamed Sedik & Co. It seems unlikely that K. Mohamed Sedik & Co. would accept a further compromise of $500, payable in various sums over a period of 5 months.

At the trial he failed to prove that he had paid the $393.85 as alleged. There were only documents to show payment of $245 off, and $250 is what he should have paid by the 12th April, 1933, if his story were true.

It is quite possible that there may have been some modification of the agreement specified in the note but if so it was a collateral arrangement the terms of which are not proved, and which came to nothing.

It is clear that Plaintiff was holder in due course. There was no defect in his title, Bills of Exchange Act, 1882, Section 36 (see *Chalmers* Bills of Exchange 10th Edition, p. 140).

The Defendant has failed to discharge the onus which lay on him and there must be judgment for the Plaintiffs for $3,000, the full amount of the promissory note with costs.

Judgment for Plaintiffs accordingly.

Solicitors for Plaintiff—*Mallal & Namazie.*
Solicitor for Defendant—*S. C. Goho.*

[ORIGINAL CIVIL JURISDICTION]
WHITLEY, J.

April 6, 1934.

KOH CHOOI PENG (f) ..... Plaintiff.

vs.

CHUNG KOK SANG & ORS.....Defendants.

[PENANG SUIT No. 499 of 1932]

Practice—Exclusion of Counterclaim—Discretion of the Court—Civil Procedure Code, S.278.

Where a counterclaim, by reason of its involving the addition of parties to the suit and overloading the suit with numerous cross-issues can more conveniently be disposed of in an independent action, the Court in its discretion may exeluded such counterclaim.

Motion by the plaintiff to exclude under Section 278 of the Civil Procedure Code a counterclaim filed by the 5th to 12th defendants.

The following statement of facts is taken in substance from the Judgment of Whitley, J., below.

The present action is an administration suit brought by the plaintiff as legal personal representative of and administratrix of the estates of two persons entitled to shares of the income of certain property under the Will of Chung Ah Quee, deceased, against the first four defendants as the present trustees of that Will. The fifth to twelfth defendants inclusive (who have filed the counterclaim) were subsequently joined as parties on their own application. Their only interest is in the corpus of the estate.

The Testator died in 1901 and the Will and the administration of the Estate have been the subject of much litigation.

For the purposes of the present application the first material date is 20th December, 1921, when judgment was given in Suit No. 217 of 1920 ordering accounts as from the year 1908 on the footing of wilful default. Accounts were taken up to 1921 and, as a result of a compromise, the claims of all parties including the plaintiff against the former trustees were, by an Order of the Court of Appeal made in that Suit on 22nd February, 1932, settled and finally disposed of (so far as concerns income from property situate in Penang) up to the 6th April, 1921.

By an Order of the 19th June, 1922, made in the same Suit the Trustees were ordered to file and pass their accounts as from the 6th June, 1922 and to do so thereafter every six months, and accounts of the Penang property were duly filed up to 30th November, 1931 and taken by the Registrar up to 31st May, 1931.

By an Order of the 12th November made in Suit No. 374 of 1924 accounts were ordered to be taken of the receipts and payments in respect of the immoveable property of the Testator in Perak and Hong Kong. These accounts have been filed up to 31st December, 1924, and 30th June, 1927 respectively but have not yet been taken by the Registrar, and no accounts since those dates have been rendered by the defendant trustees.

Hogan for the plaintiff. The plaintiff sues the trustees (Defts. 1—6) for breaches of trust and the relief claimed in the counterclaim is not against the plaintiff but against the defendant trustees and the class of persons entitled to the income is not before the Court.

The application of defendants 5 to 12 (being persons interested in corpus only) to appoint the plaintiff to represent the class of persons entitled to income shows that the counterclaim is not against the plaintiff but the class. The plaintiff cannot be compelled to represent this class and without the class there is no claim against the plaintiff.

The defendants 5 to 12 according to their defence take little interest in the plaintiff's claim but are mainly concerned with the relief claimed in counterclaim to set aside the orders and certificates in Suit No. 217 of 1920. It is embar-